

MADELINE MAYNARD, N.O.R. MINING, & BLACKHAWK MINING CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-798, 88-466

Decided June 12, 1990

Appeal from a decision of Administrative Law Judge David Torbett vacating issuance of cessation order No. 85-83-052-03 for failure to pre-sent a prima facie case (NX 6-6-R). Discretionary review of a decision vacating cessation order No. 86-408-03 issued for failure to abate the violation cited in the prior order and assessed penalties (NX 7-36-P).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

The applicable regulation, 43 CFR 4.1273(c), requires an appellant to "state specifically the rulings to which there is an objection, the reasons for such objections, and the relief requested." The regulation applies to both petitions for discretionary review and appeals arising under the Surface Mining Control and Reclamation Act of 1977.

2. Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

To show that parties were engaged in a joint venture, there must be evidence of (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre

OSMRE is required to establish a prima facie case as to the validity of a cessation order. When OSMRE asserts that a state permit was improperly issued for less than

2 acres because an area reclaimed by prior removal of material from the site should have been included as area affected under the permit, OSMRE is required to show as an initial fact that the operations were connected because there was either a direct relation between the parties or they were engaged in a joint venture.

APPEARANCES: David B. Parks, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Martin L. Osborne, Esq., Prestonsburg, Kentucky, for Blackhawk Mining Company, Inc.; George L. Seay, Jr., Esq., Frankfort, Kentucky, for N.O.R. Mining.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Office of Surface Mining Reclamation and Enforcement (OSMRE) has appealed a decision of Administrative Law Judge David Torbett dated August 12, 1987, as corrected by a decision issued August 25, 1987, vacating cessation order (CO) No. 85-83-052-03 (NX 6-6-R; IBLA Docket No. 87-798). This CO, which issued September 25, 1985, cited Madeline Maynard as permittee, Blackhawk Mining Company, Inc. (Blackhawk), as operator, and N.O.R. Mining, Inc. (N.O.R.), as contractor, and charged them with mining in excess of 2 acres without a valid surface disturbance permit from the State of Kentucky in violation of K.R.S. 350.060 and 30 U.S.C. § 1252 (1982). Following a hearing held in Pikeville, Kentucky, on November 20, 1986, Judge Torbett dismissed the CO because he concluded that OSMRE had failed to show the parties were engaged in a joint venture and, consequently, had failed to present a prima facie case supporting issuance of the CO for mining in excess of 2 acres.

While the appeal was pending, OSMRE appealed another decision by Judge Torbett, dated May 3, 1988, vacating CO No. 86-408-03 which had been issued by OSMRE to the same parties for failure to abate the violation cited in the earlier CO (NX 7-36-P; IBLA Docket No. 88-466). The CO had been issued on December 23, 1986, 2 months after the hearing but prior to the issuance of the decision. Judge Torbett concluded that, because the initial CO had been vacated, "there is no longer any basis for the issuance of the failure-to-abate Cessation order." Accordingly, he ordered OSMRE to refund \$22,500 which had been assessed as the proposed civil penalty and paid by Blackhawk in petitioning for review of CO No. 86-408-03.

OSMRE moved that its appeals be consolidated. By order dated September 30, 1988, we determined that the notice of appeal of Judge Torbett's second decision should be treated as a petition for discretionary review under 43 CFR 4.1270. 1/ We granted review and consolidated the cases.

1/ The regulations provide that a notice of appeal is the appropriate way to seek review of orders or decisions of an Administrative Law Judge which dispose of a proceeding "except a civil penalty proceeding under § 4.1150."

At stake in the case is the fate of an unreclaimed highwall (Exh. R-5). The facts concerning its origin are not in dispute. In 1977 Blackhawk was issued interim permit No. 6400-77 for a minesite of approximately 36 acres in the Big Sandy River Watershed, Pinson Branch area, of Pike County, Kentucky (Tr. 236, 248; see Exh. A-3). Subsequently, Blackhawk received Kentucky permanent program permit No. 298-0902 for the site. In late 1982, while reclaiming the site using material which had been placed in a valley fill, Blackhawk discovered that only the top 10 feet could be used because the remainder had become saturated with water (Tr. 236-37, 245-46). In order to complete highwall reclamation, Blackhawk purchased material from adjoining land owned by Madeline Maynard. The sales contract was signed on January 5, 1983, by her father and attorney-in-fact, Ellis Maynard (Tr. 99-100, 115; Exh. A-4).

Blackhawk removed the material it needed from the Maynard land and used it to reclaim a highwall on an adjoining area of its permitted site (Tr. 236-37, 239-40; Exhs. R-1, R-2). While Blackhawk was removing the material, David Gooch, Regional Administrator for the Pikeville Regional Office of the Kentucky Department for Surface Mining Reclamation and Enforcement, Natural Resources and Environmental Protection Cabinet, visited the site and, after inquiring into the matter, determined that a "borrow" permit was not needed to remove the material (Tr. 185-87, 196-97; Exh. R-17). Blackhawk completed its reclamation operations, and its bond was released on July 31, 1985 (Exh. A-7).

Blackhawk had removed soil and other material from the Maynard land down to or almost to a layer of coal (Tr. 140, 169, 238). In early May 1983, N.O.R. brought equipment onto the land and in a day or two removed approximately 1,000 tons of coal from the seam (Tr. 127, 134, 136-37, 156; Exh. R-6). On May 12, 1983, an inspector for the Kentucky Cabinet discovered the operation and cited N.O.R. for removing coal without a permit (Tr. 155; Exh. R-6). At the time, approximately one-half acre of Maynard's land had been disturbed (Tr. 76-77; Exh. R-6). As a result of the citation, Kentucky and N.O.R. entered into a settlement agreement which required N.O.R. to pay a \$2,500 civil penalty (Exh. A-2).

From the chronology of events and testimony at the hearing it appears that, as part of the agreement to settle, Kentucky also required N.O.R. to obtain a 2-acre permit for the disturbed area (Tr. 132-33). An application for a permit in the name of Madeline Maynard was filed on August 4, 1983 (Tr. 157-58; Exh. A-5). Eight days later Harry Jones, then President and sole shareholder of N.O.R. (Tr. 123, 154, 167), signed a settlement agreement with the State of Kentucky, item three of which acknowledged that the application had been filed (Exh. A-2). After being countersigned and reviewed, the settlement agreement was approved by the Secretary of the

fn. 1 (continued)

43 CFR 4.1271(a). Board review of a decision of an Administrative Law Judge concerning an assessment of a civil penalty may be sought by filing a petition for discretionary review under the procedures set forth at 43 CFR 4.1270. 43 CFR 4.1158.

Kentucky Cabinet on September 14, 1983 (Exh. A-2). Kentucky permit No. 898-0058 was issued to Madeline Maynard on October 7, 1983 (Exh. A-3). Although the permit was issued in Maynard's name, either Jones or N.O.R. had gathered the information needed for the application, paid the engineering and permit fees, and posted the bond for the site (Tr. 113, 149-51, 221).

Following issuance of the permit, N.O.R. resumed operations at the site, excavating additional overburden and mining a second level of coal (Tr. 136-37, 156). N.O.R. then reclaimed the site in accordance with its permit, including grading slopes at the base of the highwall (Tr. 164-66, 176; Exhs. R-2, R-3, R-4, R-16). On August 12, 1985, the Kentucky Cabinet granted a full bond release (Tr. 164; Exh. A-7).

In July 1985, OSMRE received a citizen's complaint about a surface mining operation in the Pinson Branch area (Tr. 25). In response, OSMRE Inspector Timothy T. Brehem visited the area in early August and, observing the remaining highwall, issued a 10-day notice to the State (Tr. 25-26, 44; Exh. R-26 at 12). The notice identified the location as the "two-acre permit adjacent to Blackhawk Mining Company. Permit No. 298-0902" (Exh. R-26 at 12). It stated that "spoil removed from two-acre was used to reclaim Blackhawk Mining Co., #298-0902 highwalls yet acreage related to this spoil area was not included in two-acre permit." *Id.*

The State did not agree that a violation existed (Tr. 46, 89; Exh. R-25). Inspector Brehem proceeded to issue CO No. 85-83-052-03 due to the presence of the highwall (Tr. 47; Exh. R-21). The CO cited the parties for violating section 502(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) which prohibits persons from conducting "surface mining operations on lands on which such operations are regulated by a State unless such person has obtained a permit from the State's regulatory authority." 30 U.S.C. § 1252(a) (1982). At that time, SMCRA did not apply to "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." *Id.* § 1278. ^{2/} The CO, however, cited the parties for conducting a mining operation in excess of 2 acres (Exh. R-21).

[1] The briefs filed by the parties address a number of issues. As a preliminary matter N.O.R. contends that OSMRE has failed to comply with 43 CFR 4.1273(c) which requires an appellant to "state specifically the rulings to which there is an objection, the reasons for such objections, and the relief requested." In response, OSMRE asserts that N.O.R. is in error because 43 CFR 4.1273(c) pertains to petitions for discretionary review of a proposed civil penalty while this case "arises by virtue of an Application for Review filed by Applicant/Appellee under 43 C.F.R. § 4.1160 et seq."

^{2/} This exemption was repealed by P.L. 100-34, Title II, § 201(a), 101 Stat. 300 (1987).

OSMRE is correct about the origin of the proceeding now before us, but overlooks the fact stated at the outset of its brief that it was filed "pursuant to the provisions of 43 C.F.R. § 1273." This statement was correct; the regulation applies to both petitions for discretionary review and appeals. See Tri Coal Co. v. OSMRE, 85 IBLA 146, 148 (1985). OSMRE also neglects to consider that its brief is in support of both its appeal of Judge Torbett's August 12, 1987, decision vacating CO No. 85-83-052-03 and discretionary review of the Judge's decision of May 3, 1988, vacating CO No. 86-408-03. However, in this case, although OSMRE has not identified specific objections to Judge Torbett's decision, it is clear that it finds objectionable his ruling that the evidence failed to show the existence of a joint venture.

The issue whether there was a joint venture is the key issue in OSMRE's appeal of IBLA 87-798, on which the result in IBLA 88-466 also depends. As correctly stated by Judge Torbett, the issue

is whether the subject highwall on the Maynard site is subject to OSMRE jurisdiction or is exempt because it is located on the less than two-acre permit. In order for OSMRE to exercise jurisdiction, they must show a related enterprise or a joint venture.

* * * * *

The record contains two surveys which are in agreement as to the size of the disturbed area know as "Area 1" (Madeline Maynard site) (Ex. R-27), (Ex. A-6), (Tr. 216). This area is less than two acres (Tr. 53, 83), (Ex. A-6), (Ex. R-27). The area of dispute is "Area 2", the portion of Blackhawk Permit No. 298-0902 to which the spoil from "Area 1" was taken. If "Area 2" is considered part of the disturbed area, the total disturbed area is greater than two acres and the two-acre exemption would not apply. In order to tie these areas together and prove the validity of the CO, OSMRE must show that Maynard, N.O.R., and Blackhawk are related enterprises or involved in a joint venture. [Footnote omitted.]

(Decision at 6-7). In a footnote Judge Torbett noted that, although OSMRE had argued at the hearing that the parties were "related" under 30 CFR 700.11(b)(2), the issue had not been briefed. However, he concluded that, because the only question the case presented in regard to the regulation was whether there was common ownership or control, a disposition on the issue of whether there was a joint venture also disposed of the issue whether the parties were "related." 3/

3/ On appeal to the Board, OSMRE has briefed the issue. We concur with Judge Torbett's analysis that in this case resolution of the joint venture issue in favor of the applicants also disposes of the issue of whether the parties are "related" under 30 CFR 700.11. In this case, the issue regarding the regulation is whether there was "common ownership or control." A showing that a joint venture existed would have necessarily established

[2] The law concerning joint ventures applied by Judge Torbett was the law of the State of Kentucky as defined by the cases cited in the parties' posthearing briefs.

A "joint venture" or "joint adventure," as it is variously referred to in Kentucky case law, denotes an informal business association which closely resembles the traditional partnership. Witsell v. Porter, 217 S.W.2d 311 (Ky. 1949). Although joint venture law has been referred to as "murky", Huff v. Rosenberg, 496 S.W.2d 352 (Ky. 1973), in Eubank v. Richardson, 353 S.W.2d 367 (Ky. 1962), the Court defined the relationship in this manner:

A joint adventure is an informal association of two or more persons, partaking of the nature of partner-ship, usually, but not always, limited to a single transaction in which the participants combine their efforts, skill, and knowledge for gain, with each sharing in the expenses and profits or losses.

Id. 353 S.W.2d at 369.

The existence of the joint adventure is determined in the same fashion as the existence of the more traditional business partnership: by focusing on the intention of the parties, as reflected in their acts, words and conduct. Boring v. Wilson, 108 S.W. 914 (Ky. 1908); Casey v. Bradley, 168 S.W.2d 36 (Ky. 1943). The joint adventure may be established without a writing evidencing such agreement, and such an agreement, implied from a course of conduct, will be held binding though it is parol. Whitsell v. Porter, 217 S.W.2d 311, 313 (Ky. 1949), Jones v. Nickell, 197 S.W.2d 915 (Ky. 1944).

The four elements of a joint venture are: (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control. Huff v. Rosenberg, 496 S.W.2d at 355. In order to carry their burden, OSMRE must prove all four of these elements.

(Decision at 7).

fn. 3 continued

that there was common control among the parties, although the community of pecuniary interest may or may not have been common ownership. Because the elements of a joint venture are independent, the failure to show there was a joint venture does not in all cases exclude common control or ownership. However, when the failure is due to the inability to show a community of pecuniary interest or an equal right of control, correspondingly, there can be no common ownership or control.

Judge Torbett concluded that OSMRE had failed to establish the four elements. OSMRE argues that Harry Jones acted as a common agent assisting all of the parties and asserts that they all derived benefit from the events which occurred. We have reviewed the record, the decision, and the briefs and conclude that, although Jones indeed was a central figure in the events which occurred, Judge Torbett correctly concluded that OSMRE failed to show that a joint venture existed among the parties.

From the outset, OSMRE has contended that the Madeline Maynard permit was improperly issued as a 2-acre permit because the highwall area reclaimed by Blackhawk using material removed from the permitted area should have been included. OSMRE is correct that if the latter area is included, the total area exceeds 2 acres (Exh. R-27). As an evidentiary matter, for the area to be included OSMRE needed to show that N.O.R. was involved in Blackhawk's operations at the site, Blackhawk was involved in N.O.R.'s operations, or that there had been a relationship among the parties constituting a joint venture.

There was a contract between Blackhawk and Maynard for the sale of material from her land (Exh. A-4). As testified to by Jones, the origin of the contract was that:

My brother-in-law was dating Mr. Maynard's daughter, and she lived in Nevada. So she was in and he was--they were talking about, I guess, getting married and putting a trailer in, and they were talking about getting a house seat made somewheres [sic].

As a friend to the family--and they were talking about getting it made at this area--I said, Blackhawk might need some dirt. You might be able to sell them the dirt and get you a trailer seat at the same time. That is how that came about.

(Tr. 148). The contract, of course, was an explicit agreement and had clear purposes. It was, however, a contract of sale and not a document which established a business association in the nature of a partnership. It set forth no common purpose, no common pecuniary interest, and no common right of control. Each party had its own purpose and received its own benefit--Blackhawk, the material it needed, and Maynard, cash and a flattened area for a "house seat" on which to put a trailer (Tr. 186, 249; Exh. A-4). A waiver for this purpose was included in the Maynard permit (Exh. A-5, Item 29 and Supporting Letter). Having purchased the material it needed, Blackhawk, without control by Maynard (Tr. 114-15), removed it and reclaimed the highwall on its permit (Tr. 236-40).

Although it appears that Jones approached both Maynard and Blackhawk in setting up the contract (Tr. 103, 160) and acted as an intermediary in delivering both Blackhawk's contract and its check (Tr. 116, 118-19), neither Jones nor N.O.R. was a party to the contract and there is no evidence that Jones was acting as an agent for either Blackhawk or Maynard or received any benefit for obtaining the contract (Tr. 159-60). The contract

was prepared by Blackhawk and delivered to Jones by Blackhawk's superintendent, James Herman Taylor (Tr. 135, 138). It was signed by Taylor as agent for Blackhawk and the handwritten changes made to the typed form are initialed "J.T." (Exh. A-4).

There is no evidence that either Jones or N.O.R. participated in the removal of the material. Inspector Brehem had no knowledge of N.O.R. having done any work on Blackhawk's lower permit area (Tr. 75, 94-95). Jones, testifying as a witness for OSMRE, stated that neither he nor N.O.R.'s employees had worked at the site during the reclamation operation or removed any of the spoil material Blackhawk had purchased (Tr. 142, 158, 164-65, 171), but rather that the work had been done by Taylor and Blackhawk's foreman, Jack Davis (Tr. 141). Ellis Maynard, who also testified as a witness for OSMRE, stated that when he was at the site the material was being removed by Davis (Tr. 114-18). Appearing as a witness for Blackhawk, David Gooch also testified that as far as he knew Jones did not conduct any reclamation activities on the Blackhawk permit (Tr. 192). Finally, Davis testified that he had performed the work under Taylor's direction and without consulting N.O.R. or Jones (Tr. 237, 248-49).

N.O.R. did have a relationship with Blackhawk. It was the sublessee or contractor on a separate mining operation conducted under Blackhawk's permit No. 898-0057 on the hilltop above and 1500-2000 feet from the boundary of permit No. 898-0058 (Tr. 75, 123-26, 160, 175). The fact that N.O.R. was involved with Blackhawk on one permit, however, does not make it a party to all permits held by Blackhawk. Jones testified that he did not work on any of Blackhawk's other permits (Tr. 125, 160). There was no evidence to the contrary.

Of some importance is the fact that the lease under which N.O.R. mined coal from the Maynard permit site was signed, and apparently negotiated, at the same time as the contract between Maynard and Blackhawk (Tr. 103, 110-11, 139, 154; Exh. R-18 at 9). There is, however, no evidence that Blackhawk knew of the arrangement when it purchased the material from Maynard or any time prior to the date Jones initially removed coal and was cited by the State of Kentucky, at which point, presumably, the fact became public. Rather, it appears Jones simultaneously leased the coal because he knew mining would be easier with the surface material removed (Tr. 170-71).

Blackhawk had completed or nearly completed the removal of its material from the Maynard land prior to Jones taking the coal and had completed its reclamation operations and had its bond released prior to the issuance of the Madeline Maynard permit (Tr. 147, 158, 188, 239; Exh. A-8). The evidence was that Blackhawk did not remove any coal from the land during its reclamation operations (Tr. 238). Nor was there any evidence that Blackhawk was either involved in N.O.R.'s coal mining on the site, initially or after the permit was issued, or benefited from it. Jones was the sole shareholder of N.O.R. and held no interest in Blackhawk (Tr. 123, 154, 158, 167). Neither Blackhawk nor its owners held an interest in N.O.R. (Tr. 159, 167). Nor did it purchase the coal N.O.R. removed (Tr. 168, 239). Except for N.O.R.'s operations on the hilltop site and the lease of a drill (Tr. 141,

242-44), no evidence was presented as to any financial, contractual, or corporate relationship between Blackhawk and N.O.R. or Jones.

Inspector Brehem had no knowledge of Blackhawk removing coal from the Maynard permit area, no knowledge of Blackhawk holding an economic interest in N.O.R., and no knowledge that it had received any financial benefit (Tr. 74-75, 82, 93-94, 98). In issuing the 10-day notice and subsequent CO, he relied on a statement in the settlement agreement between Jones and the State of Kentucky (Tr. 27, 39-40, 74; Exhs. R-24, R-26). The agreement states: "That N.O.R., as subcontractor for Black Hawk, was to remove spoil from property adjacent to an expired permit which was issued to Black Hawk in order to eliminate a highwall on said expired permit" (Exh. A-2). Due to the statement, Inspector Brehem concluded that N.O.R. had conducted all of the operations which created the highwall (Exhs. R-22, R-24, R-26 at 4). Jones testified that the statement was incorrect and that he had not read the document carefully (Tr. 132, 137, 163). As discussed above, all witnesses agreed that removal of the soil had been done by Blackhawk's personnel. ^{4/}

OSMRE also introduced several other documents Inspector Brehem relied upon when he issued the original CO. Two portions of the Madeline Maynard permit application are of concern. One is item 36 which asks for the source of the legal right to mine the area. The information provided in the application is that it was a deed dated April 28, 1982. Although the inspector understood the date to refer to N.O.R.'s right to mine (Tr. 66-67), suggesting that N.O.R. held mineral rights prior to Blackhawk's removal of material from the Maynard land, item 36 in fact refers to the date Madeline Maynard, the permit applicant, had received title to the property from her father (Tr. 217-18).

The other area of concern in the permit application was item 26 which sought information regarding a plan for the use of explosives. The information provided on the application states: "N/A, all blasting on the area will be done by Blackhawk Mining Co., they have the area permitted as a borrow area to reclaim a nearby highwall. This area is being proposed as a 2-acre permit so coal removal may be employed" (Exh. A-5, Item 26). Although this indicates that Blackhawk would be involved in N.O.R.'s coal removal

^{4/} There is no indication as to why the statement was included in the agreement. The document was apparently drafted by the Kentucky Cabinet's Office of General Counsel in Frankfort (Tr. 193; Exh. A-2). If so, the documentation on which the drafter relied may not have made clear that Blackhawk held two permits in the area, so that the fact N.O.R. was a subcontractor on the hilltop site became indistinguishable from the fact that Blackhawk had removed material from the Maynard land from which N.O.R. had removed coal. Even if we were to hold that N.O.R. cannot now deny the truth of the statement, it would not be binding on Blackhawk. Blackhawk was not a party to the proceeding which resulted in the agreement. Thus, in this proceeding, it would be entitled to an opportunity to challenge the evidence offered to establish that N.O.R. was its subcontractor in the removal of spoil from the Maynard property.

operations, the statement was incorrect in two respects. First, Blackhawk did not have a borrow permit (Tr. 59). Second, Blackhawk's blasting had been done prior to the date N.O.R. was cited for removing coal without a permit (Tr. 151, 161, 244). David Rasnick, the engineer who supervised the preparation of the permit application (Tr. 212-13), testified that "N/A" meant that blasting would not be required because the spoil had already been removed by Blackhawk. He also testified that he had mistakenly assumed that Blackhawk had a borrow permit, and that the answer under that item was generally incorrect (Tr. 217-18, 220-21, 232). Judge Torbett concluded that Rasnick's testimony was credible and consistent with the other testimony. Nothing in the record suggests that Judge Torbett was wrong in his conclusion.

Inspector Brehem also examined a log book maintained by the Mine Health and Safety Administration and obtained copies of the relevant records (Tr. 64; Exh. R-7). He admitted, however, that the records are kept by geographical area and not individual mining permits or operations (Tr. 64-65, 84) and consequently show no relationship between Blackhawk and N.O.R. as to the Maynard permit area (Tr. 85-87).

[3] OSMRE was required to establish a prima facie case as to the validity of the cessation order. 43 CFR 4.1171(a); Coal Energy, Inc. v. OSMRE, 105 IBLA 385 (1989). To support its theory that the Madeline Maynard permit was improperly issued for less than 2 acres, OSMRE was required to establish as an initial fact some basis for concluding that the area reclaimed by Blackhawk should be included as the area affected under the permit. To do so it was necessary to establish either a direct relation among the parties or show that they were engaged in a joint venture. Because the record is lacking evidence showing that either N.O.R. or Blackhawk was involved in the other company's operations on the land included in the Maynard permit, and because we agree with Judge Torbett that the evidence does not show a joint venture among the parties, we affirm his conclusion that OSMRE failed to establish a prima facie case. As a necessarily corollary, Judge Torbett's decision ordering the refund of \$22,500 under CO No. 86-408-03 must also be affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of Administrative Law Judge Torbett are affirmed.

Gail M. Frazier
Administrative Judge

I concur:

James L. Burski
Administrative Judge